APPENDIX A

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 02-50869
Summary Calendar

KARL A. WHITE,

Plaintiff-Appellant,

VERSUS

AMERICAN HABILITATION SERVICES, INC.

Defendant-Appellee.

Appeals for the United States District Court
For the Western District of Texas

(A-01CA-377-SS)

FILED May 14, 2003

Before JONES, STEWART, and DENNIS, Circuit Judges.
DENNIS, Circuit Judge:*

In this employment discrimination action, Kevin White pro se alleges that his former employer, American Habilitation Services, Inc. ("AHS"), demoted and eventually discharged him in violation of Title VII and the Americans with Disabilities Act of 1990 ("ADA"). 1 The district court granted summary judgment for AHS. White Now appeals. We AFFIRM.

*Pursuant to 5th CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47. 5. 4.

I.

Because White provides no recitation of facts in his brief, We accept and adopt the district court's presentation of the Relevant facts:

AHS provides daily living assistance in group homes for individuals with mental and physical disabilities. White began working t AHS on July 21, 2000 as a Residential Manager. He was hired by Rich Franks, the Residential Director of AHS's grouphomes in Austin. White is an African-American male and is hearing-impaired such that he can only hear loud noises. White's responsibilities as Residential Manager included supervising direct care staff, staffing the group homes, and being on call. During his employment with AHS, he also worked at the Texas School for the Deaf ("TSD") as central plant monitor. AHS has a policy that outside employment must not compete with an employee's job performance.

on September 8, 2000, while White was on call, Franks paged him and asked him to assist with a staff shortage at one of the group homes. At the time, White was at his TSD job and refused leave to cover the shortage, even though Franks explained to him he needed to choose his primary employer. On September 13 , 2000, White was suspended pending termination. In lieu of termination, AHS offered him a direct care position at the Kenyon house, one of the group homes. White was informed if he did not appear at the job on September 28, the job offer would be considered rejected and his employment would be terminated. He

did not appear on that date and was terminated. AHS filled the Residential Manager position with an African-American female who had worked for the company since July 2, 1999.
In addition to these facts, the record shows that White presented

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1 42 U.S.C. §§ 12101 et seg.

AHS with a list of his conditions for taking the direct care position. Only one of White's conditions-his demand that AHS provide a TTY machine with a flashing light-constitutes a request for an accommodation of his disability. The record shows that AHS agreed to this condition.
After his demotion but before his termination, White filed a complaint with the Texas Commission on Human Rights ("TCHR") . He alleged AHS had discriminated against him on the bases of disability, race, and gender. The TCHR issued a right-to-sue letter on March 19, 2001, and White filed this lawsuit on June 18, 2001. The district court granted AHS's motion for summary judgment. This appeal followed.

II.

Because White addressed only his ADA claim in his Appellate brief, we assume that he has abandoned his race- and gender-based discrimination claims. 2 We further assume that White's ADA claim consists of two parts, one related to his demotion and the other related to his subsequent termination.

We construe the latter part to allege retaliatory discharge.

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2 See Sherrod v. American Airlines, Inc., 132 F. 3d 1112, 1119 n. 5 (5th Cir. 1998). ("[We] need not address whether the plaintiff raised a genuine issue of material fact regarding her claims for discrimination under the [Age Discrimination in Employment Act] and [Texas Commission on Human Rights Act]. [The plaintiff] waived review of these issues by not briefing them in the Argument of her brief.").

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A.

We review the district court's grant of summary judgment de novo, applying the same standards followed below. 3

B.

As an initial matter, we hold that the district court properly determined that White had exhausted his administrative remedies prior to filing his lawsuit. The record shows that he filed a complaint with the TCHR on September 18, 2000-after his demotion but before his termination. The TCHR issued a right-to-sue letter on March 19, 2001, and White filed his lawsuit on June 18, 2001. 4 To the extent that White contends he was terminated in retaliation for demanding a TTY machine as a condition of accepting the direct care position, his retaliatory discharge claim is a natural extension of the claims presented in his TCHR complaint, which alleged (among other things) the denial of reason-

able accommodation including interpreters. Accordingly, both the demotion claim and the retaliatory discharge claim were properly before the district court. 5

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3 EEOC v. R.J. Gallagher Co., 181 F. 3d 645, 653-54 (5th Cir. 1999).

4 See 42 U.S.C. § 2000e-5(f)(l) (requiring the complainant to file a lawsuit within 90 days of his receipt of the right-to-sue letter). AHS implicitly concedes that White's lawsuit was timely.

5 See Ray v. Freeman, 626 F. 2d 439, 442 (5th Cir. 1980) ("As long as allegation in the judicial complaint and proof are 'reasonably related' to charged in the administrative filing and 'no material differences' between them exist, the court will entertian them.").

White's first contention is that he was unlawfully demoted from his managerial position to a direct care position in violation of the ADA. The ADA prohibits an employer from discriminating against a "qualified individual with a disability" on the basis of his disability. 6 A plaintiff alleging disability discrimination in employment must make out a prima facie showing that (1) he has a disability, (2) he was qualified for the job, and (3) he was subject to an adverse employment action because of his disability. 7

Based on our review of the record, we conclude that White has failed to make a prima facie case of discrimination in relation to his demotion. In particular, White has shown no

evidence that he was qualified for the job or that he was demoted from his managerial position because of his disability. On the contrary, the uncontradicted evidence shows that he was demoted because he was unwilling to perform the on-call duties of his position. Thus, the record supports only one conclusion: AHS demoted White because his second job, not his disability, rendered him unable to function as a manager.

White's second contention is that AHS terminated him because he demanded that it supply him with a TTY machine and interpreters.

The ADA prohibits an employer from retaliating against an em ployee

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6 Ivy v. Jones, 192 F. 3d 514, 516 (5th Cir. 1999) (citing 42 U.S.C. § 12112 (a)).
7 Id.

who asserts his rights under the ADA. 8 To make out a prima facie case of retaliation, a plaintiff must show that (1) he was engaged in protested activity, (2) there was an adverse employment action, and (3) a causal link existed between the two.9 "In order to establish the causal link between the protected conduct and the illegal employment action as required by the prima facie case, the evidence mush show that the employment's decision to terminate was based in part on knowledge of the employee's protected activity." 10 If the plaintiff makes the prima

facie showing, the burden shifts to the employer "to come forward with a legitimate, non-discriminatory reason for the adverse employment action." 11 If the employer satisfies this requirement, the burden shifts back to the employee to "adduce sufficient evidence that would permit a reasonable trier of fact to find that the proffered reason is a pretext for retaliation." 12

The evidence shows that White at various points during his tenure request interpreters for meetings and that he demanded a TTY machine as a condition of accepting his demotion to the direct

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8 42 U.S.C. § 12203 (a).
9 Sherrod, 132 F. 3d at 1122 n. 8.
10 Id. at 1122
11 Id. (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
12 Id. (citing McDonnell Douglas, 411 U.S. at 804).

care position. We assume for the present purpose that White can satisfy the first and second elements of the required prima facie showing. But we can find no evidence in the record, and White has identified none beyond his self-serving "gut feelings," 13 supporting even an inference of a causal link between his accommodation requests and his termination. The only evidence linking the two is the uncontroverted fact that AHS acceded to White's demand that it install a TTY machine equipped with a flashing light. This evidence supports only an inference in support of AHS's position. Viewed in the light most favorable to White, we conclude that no evidence shows that AHS's decision to discharge White was based in any part on his accommodation requests.

Even if White had made the required prima facie showing, however, he could not meet his burden of responding to AHS's reason for his discharge. AHS explained that White's employment terminated when he failed to report to work on September 28, 2000, after being told that his failure to report would be considered a resignation. White has failed to adduce any evidence showing that his failure to report was not the real reason for his discharge. Indeed, the uncontradicted evidence shows that AHS agreed to provide White with a new TTY machine, as demanded, and had In other

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13 See Doughlass v. United Servs. Auto Ass'n., 79 F. 3d 1415, 1430 (5th Cir. 1996) (en banc) ("It is more than well-settled that an employee's subjective belief that he suffered an adverse employment action as a result of discrimination, without more, is not enough to survive a summary judgment motion.") .

ways accommodated White's disability during his short tenure with the company. Because there is no evidence of disability-related animus directed at White by AHS, and because there is unimpeached evidence to the contrary, no reasonable jury could find for White on the ultimate question of whether the adverse employment action would have occurred but for the protected activity. 14

III.

For the foregoing reasons, we AFFIRM the district court. AFFIRMED.

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14 Sherrod, 132 F. 3d at 1122 .

APPENDIX

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

KARL A. WHITE

-vs- Case No. A-01-CA-377-SS

AMERICAN HABILITATION SERVICES, INC.

FILED 2/19/02

ORDER

BE IT REMEMBERED on the 19th day of February 2002 The Court reviewed the file in the above-styled cause, specifically Defendant's Motion for Summary Judgment[#18] and Plaintiff's response [#21]. Having considered the motion and response, the case file as a whole and the applicable law, the Court enters the following opinion and order.

This is an employment discrimination case under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 1981, and the American with Disabilities Act ("ADA"). The

Background

AHS provides daily living assistance in group homes for individuals with mental and physical disabilities. See Motion, Ex. C ("Cook Affidavit"), at ¶ 6. White began working at AHS on July 21, 2000 as a Residential Manager. He was hired by

Rich Franks, the Residential Director of AHS's group homes in Austin. See Motion, Ex. B ("Franks Affidavit"), at ¶ 2, 4. White is an African-American male and is hearing-impaired such that he can only hear loud noises. See Motion, Ex. A1 ("White Deposition"), at 18. White's responsibilities as Residential Manager included supervising direct care staff, staffing the group homes, and being on call. See White Deposition, at 108-09. During his employment with AHS, he also worked at the Texas School for the Deaf ("TSD") as central plant monitor. See White Deposition, at 83; Motion, Ex. C13 ("Notification of Outside Employment"). AHS has a policy that outside employment must not compete with an employee's job performance. See Motion, Ex. C2.

On September 8, 2000, while White was on call, Franks paged him and asked him to assist with a staff shortage at one of the group homes. See Franks Affidavit, at ¶ 17. At the time, White was at his TSD job and refused to leave to cover the shortage, even though Franks explained to him he needed to choose his primary employer. See id. On September 13, White was suspended pending termination. See Motion, Ex. C8. In lieu of termination, AHS offered him a direct care position at the Kenyon House, one of the group homes. See Franks Affidavit, at ¶ 19. White was informed if he did not appear at the job on September 28, the job offer would be considered rejected and his employment would be terminated. See Motion, Ex. C10. He did not appear on that date and was terminated. See Motion, Ex. C14. AHS filled the Residential Manager position with an African-American female who had worked for the company since July 2, 1999. See Cook Affidavit, at ¶ 15.

Summary Judgment Standard

Summary judgment may be granted if the moving party shows there is no genuine issue of material fact, and it is entitled to judgment as a matter of law. See FED. R. CIV. P. 56©. In deciding summary judgment, the Court construes all facts and inferences in the light most favorable to the

nonmoving party – here, the plaintiff. Hart v. O'Brien, 127 F.3d 424, 435 (5th Cir.1997), cert. Denied, 119 S. Ct. 868 (1999). The standard for determining whether to grant summary judgment "is not merely whether there is sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the nonmoving party based upon the record evidence before the court." James v. Sadler, 909 F.2d 834, 837 (5th Cir. 1990).

Both parties bear burdens of producing evidence in the summary judgment process. See Celotex Corp. v. Catrett, 106 S. Ct. 2548 (1986). First, "[t]he moving party must show that, if the Evidentiary material of record were reduced to admissible evidence in court, it would be insufficient to permit the nonmov-Ing party must then "set forth specific facts showing a genuine issue for trial and may not rest upon the mere allegations or denials of its pleadings." *Id.* However, "[n]either 'conclusory allegations' nor 'unsubstantiated assertions' will satisfy the non-

movant's burden." Wallace v. Texas Tech Univ., 80 F.3d 1042, 1047 (5th Cir. 1996).

Analysis

I. Exhaustion of Administrative Remedies

AHS contends White did not file an administrative complaint. Under Title VII and the ADA, a plaintiff must first exhaust his administrative remedies by filing a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") or the Texas Commission on Human Rights ("TCHR") before filing a lawsuit in federal Court. See 42 U.S.C. § 2000e-5; 42 U.S.C. § 12117(a); Dao v. Auchan Hypermarket, 96 F.3d 787, 788-89 (5th Cir. 1996); Cruce v. Brazosport Independent Sch. Dist., 703 F.2d 862, 863 (5th Cir. 1996). The Fifth Circuit has held that failure to

file an administrative charge strips this Court of Subject matter jurisdiction over a plaintiff's discrimination claim. See Tolbert v. U.S., 916 F.2d 245, 247-48 (5th Cir. 1990).

On September 18, 2000, White filed a charge with the TCHR and EEOC, claiming he was denied accommodation and training and was suspended and demoted on the September 14 on the basis of his race, sex and disability. See Response, Ex. A ("TCHR Charge"). The EEOC issued him a right-to-sue letter on March 19, 2001. See Response, Ex. C. AHS contends White did not exhaust his administrative remedies because his charge only contested his demotion and suspension, not his termination, which he contests in this suit. However, White claims he returned to TCHR on September 25, 2000 to supplement his claim, and the record shows he submitted a claim on plaintiff can not raise new acts of discrimination not present in his

administrative charge, White's claims of wrongful discharge are natural extension of his claims of wrongful demotion and suspension and failure to accommodate, which he raised in his TCHR charge. See Ray v. Freeman, 626 F.2d 439, 442 (5th Cir. 19980) ("As long as allegations in the judicial complaint and proof are 'reasonably related' to charged in the administrative filing and 'no material differences' between them exist, the court will entertain conclusion of the events leading up to it and was based on the same alleged acts of discrimination White included in his charge. Therefore, the Court has jurisdiction over White's claims.

I. Title VII and Section 1981 Claims

White claims AHS discriminated against him because he was an African-American male.
Under Title VII, it is unlawful for an employer to discharge any individual because of his or her sex.

See 42 U.S.C. § 2000e-2(a)(l). To establish a prima facie case of employment discrimination under Title VII, a plaintiff must either produce direct evidence or an employer's animus or, if direct proof is lacking, produce enough facts to implicate the burden-shifting framework of McDonnell Douglas Corp. v. Green, 93 S. Ct. 1817 (1973). The McDonnell Douglas burden-shifting scheme "creates a presumption that the employer unlawfully discriminated against the employee" if the plaintiff proves: (1) he was a member of a protected class; (2) he was otherwise qualified for the position; (3) he suffered an adverse employment action; and (3) non-protested class employees were not treated similarly. See St. Mary's Honor Center v. Hicks, 113 S. Ct. 2747 (1993); Bauer v. Alemarle Corp., 169 F.3d 962, 966 (5th Cir. 1999). Once this prima facie case is established, the

burden of production shifts to the employer to articulate legitimate, non-discriminatory reasons for its conduct. See St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2747 191993). If the employer meets this burden, the burden of production then shifts back to the plaintiff to prove that the proffered resaons for any allegedly unequal treatment are a pretext for unlawful discrimination. See Hicks, 113 S. Ct. at 2749, 2753. A plaintiff's prima facie case, combined with evidence showing the employer's proffered justification is false, may permit the trier of fact to conclude the employer unlawfully discrimination against the plaintiff. See Reeves v. Sanderson Plumbing Prod., Inc., 120 S. Ct. 2097, 22109 (2000). At all times, however, the plaintiff bears the burden of persuasion-that Is, persuading the trier of fact that the defendant intentionally discriminated against him.. See id. at 210.

White has not demonstrated a prima facie case of discrimination on the basis of race or sex. While he was a member of a protected class, namely an African-American male, and was demoted and later terminated, he has provided no evidence that he was treated any differently than similarly

situated female or non-black employees.1 After his termination, an African-American woman was hired to fill his former position. See Cook Affidavit, at ¶ 15. Additionally, White has not shown employees whose secondary employment interfered with their AHS responsibilities were treated differently than he was.

Moreover, AHS has given a legitimate, non-discriminatory reason for demoting him and, later, terminating him: he violated the company policy by allowing outside work to interfere with his job and failed to fulfill his on-call responsibilities. White has offered no evidence that AHS's reason for demoting or terminating him was pretextual, and the

court finds no such evidence on the record. White's demotion was a direct result of his refusal to fill in for a staff shortage when he was on call on September 8, 2000 because he did not want to leave his second job at the TSD. AHS's policy clearly prohibits outside employment interfering with employees' work responsibilities, and White was aware of that policy. See White Deposition, at 108-09; Notification of Outside Employment. The Court find no evidence of discrimination on the record, and summary judgment is appropriate.

Likewise, summary judgment is appropriate on White's section 1981 racial discrimination claim, because such claims are evaluated under the same evidentiary framework as Title VII claims.

See Deffenbach-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 587 (5th Cir. 1998). Additionally, section 1981 required evidence of intentional discrimination, none of which White has provided.

See Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987).

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1 White's deposition confirms his lack of evidence of race or sex discrimination other than his personal beliefs. For instance, he testified he believed several of his superiors did not like him because they are lesbians and therefore do not like men. See White Deposition, at 182-84 ("I feel that the relationship she has with another woman automatically shows she don't like [sic] males.") Such stereotypes do not a discrimination case make.

III. Americans with Disabilities Act

White claims he was discriminated against on the basis of his hearing impairment and terminated in retaliation for his request for accommodation of his disability. To demonstrate a prima facie case of disability discrimination, White must show: (1)he has a disability; (2) he was qualified for the job; and (3) he was adverse employment decision because of his disability. See Ivy v. Jones, 192 F.3d 514, 516 (5th Cir. 1999). White has shown no nexus between his demotion and, later, termination and his hearing impairment as an asset, because many of the residents White worked with were hearing impaired. See Frank Affidavit, at ¶ 7. Moreover, as noted above, AHS has provided a legitimate, non-discriminatory reason for demoting and terminating White: his second job interfered with his job responsibilities. Therefore, summary judgment is appropriate on White's disability discrimination claim.

In accordance with the foregoing:

IT IS ORERED that Defendant's Motion for Summary Judgment [#18] is GRANTED.

SIGNED this the 19th day of February 2002.

SAM SPARKS
UNITED STATE DISTRICT JUDGE

WILLIAM K. SUTER,
Clerk of the Court
AND TO
EMILIE LANSTRA,
Employee of the Clerk

SUPREME COURT
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Date: December 1, 2003